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# Unrecorded Transactions between Husband and Wife

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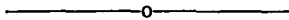
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class with a short address upon the problems of young attorneys in the practice, which was very much appreciated by the class.

Hon. M. T. Kelley, of the Pineville Bar, has agreed to give a series of lectures on adverse possession. Mr. Kelley has made a special study of this phase of the law and his lectures will be of much value to the students and others who may be able to hear them.

Several hundred volumes have been added to the library recently, so that it now contains more than ten thousand well-selected law books. The practice court work is being more successfully done this year by dividing the class into small sections and requiring three recitation periods each week from each section. Judge Lafferty has prepared a Practice Manual for the use of the students, which classifies the year's work into contested and uncontested cases, and carries the class over all the phases of the practice possible to be covered in one year's work.

Commandant Fairfax has kindly consented to permit the first year law students to drill one year in the battalion with all the honors and privileges of students from the other departments.



## UNRECORDED TRANSACTIONS BETWEEN HUSBAND AND WIFE.

### 1. The Problem Stated.

The Weisinger Act of 1894 abrogated almost completely the common law doctrine of a feme covert's disability, so that a married woman can deal with strangers almost as freely as can a married man. It was once thought that the Weisinger Act did not affect the common law doctrine of the oneness of husband and wife, and that therefore a married woman still could not contract with her husband; see *Stroud v. Ross*, 118 Ky., 630, 82 S. W., 254, 26 Ky. L. Rep., 521. But that idea has been repudiated by the later cases; *Coleman v. Coleman*, 142 Ky., 36, 133 S. W., 1003; *Niles v. Niles*, 143 Ky., 94, 136 S.

W., 127. And under the present Kentucky law a wife can deal with her husband upon exactly the same terms as with a stranger, subject only to the limitation that "a gift, transfer, or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded." Ky. St., Sec. 2128.

The purpose of this essay is to inquire into the meaning of that statutory limitation. In other words, when may a transaction be attacked because it is between spouses and not recorded, although the same transaction between strangers would not be subject to attack? It should be noted that transactions between spouses, whether recorded or unrecorded, are frequently set aside for reasons which would equally affect transactions between strangers; for example, because actually or constructively fraudulent toward creditors or because preferential; but this paper will not deal with such cases except to distinguish them from cases involving the question propounded above.

## 2. Who May Attack the Transaction?

The statute provides that unrecorded gifts, transfers, or assignments of personalty between spouses shall not be valid as to third persons. The wife cannot avoid a transaction with her husband upon any ground which would not apply equally to a transaction with a stranger. It may still be true that a wife cannot convey land directly to her husband; see *Newly v. Cox* (1883), 81 Ky., 58, 4 Ky. L. Rep., 744. If so, that is because a conveyance of real estate from a married woman is invalid unless her husband join as grantor or is already grantor in a previous deed. Ky. St., Sec. 506. Obviously a man cannot be both grantor and grantee of the same grant. On similar reasoning it may be that a married woman cannot contract with her husband to convey to him her real estate, because her executory contract to convey realty is not good unless her husband join. Ky. St., Sec. 2128. Obviously a man cannot be both promisor and promisee of the same promise. With this explanation, it will be seen that the case of land does not really constitute an exception to the statement that a wife

cannot avoid a transaction with her husband upon any ground which would not apply equally to a transaction with a stranger.

Likewise, a husband cannot avoid a transaction with his wife upon any ground which would not apply equally to a transaction with a stranger.

Heirs, devisees, distributees, and legatees are not considered "third persons" within the meaning of the statutory provision under discussion; and an unrecorded gift between spouses which would be valid if between strangers, cannot be set aside at the instance of such volunteers, *McWethy's Admx. v. McCright*, 141 Ky., 816, 133 S. W., 1001. But it should be noted that a gift from wife to husband will be closely scrutinized for undue influence and that here the burden is upon the husband to show that the gift was made voluntarily by the wife. *Long v. Beard*, 20 Ky. L. Rep., 1036, 48 S. W. 158; *Buckel v. Smith's Admr.*, 26 Ky. L. Rep., 494, 82 S. W., 235. This matter of the *onus probandi* is the only respect in which gifts between strangers differ from gifts between spouses when the question is raised by volunteers.

The words "third persons" here include, however, purchasers, existing creditors, and probably subsequent creditors. In *McWethy's Admx. v. McCright*, *supra*, the court said:

"The words 'third persons' \* \* \* as used in the statute do not refer to or include a person \* \* \* who has no interest in the property given or conveyed, or does not sustain to the donor the relation of creditor or to the property that of an innocent purchaser. \* \* \* The object of the statute is to compel the giving \* \* \* of notice \* \* \* to creditors and purchasers and also others who might have an interest in the property transferred. \* \* \* A creditor for whom the notice is required and who would be prejudicially affected by the gift can act upon it by refusing the donor further credit or taking the legal steps necessary to subject the property to his debt."

Doubtless a person having an equitable interest which would be cut off by a bona fide sale to an outsider, can have set aside an unrecorded sale to the husband or wife of the trustee or legal owner.

A creditor, purchaser, or other interested party, who has actual notice of the transaction, cannot complain of want of the constructive

notice afforded by a recorded instrument. *Jones v. Louisville Tobacco Warehouse Co.*, 135 Ky., 824.

### 3. Cases Where There Is No Consideration.

A gift to a stranger may be attacked by a creditor of the donor whose debt existed at the time the gift was made. Ky. St., Sec. 1907. The invalidity of such gifts to a spouse, whether recorded or unrecorded, therefore, does not involve our peculiar problem when the attack is made by an existing creditor. It should be noted, however, that the furnishing of necessities to one's wife, sometimes loosely called giving, is not really a gift but the performance of a legal duty, and cannot be successfully attacked even by a prior creditor.

Where the attack is made by subsequent creditors, a gift to a stranger cannot be set aside unless made with actual fraudulent intent. Is the rule otherwise as to gifts between spouses? A valid gift to a stranger is accompanied by a change of possession or by a recorded instrument. Ky. St. Sec. 1908. Prospective creditors of the donor are not likely to be misled; but a change of possession between husband and wife cannot be detected by the naked eye of a prospective creditor. Unless a gift between spouses is recorded, outsiders are apt to extend further credit in reliance upon the supposition that the donor still has title. Without over-emphasizing the force of a mere dictum, attention may in this connection be again called to the passage already quoted from the opinion in *McWethy's Admx. v. McCright*.

"A creditor for whom the notice is required \* \* \* can act upon it by refusing the donor further credit."

The husband's creditors sometimes complain that he has expended his own means in improving his wife's real estate. When the husband was solvent at the time and there was no fraudulent intent, even existing creditors cannot successfully attack the transaction. *National Roofing Material Co. v. Smith*, 165 Ky., 848, 178 S. W., 1125. Where there is no intention to defraud and the improvements cannot be subjected to the husband's debts without substantially taking the wife's own property, the same thing is true. *Robinson v. Huffman*, 15 B. Mon., 82, as explained in *Heck v. Fisher*, 78 Ky., 643. Where there is actual fraudulent intent in which the wife actively participates, per-

haps she may be deprived of title to satisfy creditors. That question is raised but not answered by the opinion in the last named case. The same case decides that where the wife knows of the husband's actually fraudulent intent and acquiesces in it, the chancellor may through a receiver rent out the property and apply to existing debts the increase in the rental value due to the improvements. These results do not involve our peculiar problem, for the same results are reached when the land improved is not that of a wife. *Athey v. Knotts*, 6 B. Mon., 24; *Newcomb v. Phillips*, 10 Ky. L. Rep., 552, 9 S. W., 529. It is submitted that improving another's land is not a gift "of personal property" and that the statutory provision under consideration does not apply to such transactions.

The question of life insurance for the benefit of a spouse or assigned to a spouse, which logically belongs here, is reserved for discussion in a later article.

#### 4. Cases Where There Is Consideration.

The statutory requirement of record is not confined to gifts but applies also to "transfers" and "assignments" of personal property between husband and wife. In *Stix v. Calender*, 155 Ky., 806, 160 S. W., 514, in which an unrecorded gift was set aside at the suit of existing creditors, the court seems to have assumed that the result would have been otherwise if the wife had furnished consideration for the transfer. That assumption, however, in no way affects the decision. In *National Roofing Material Co. v. Smith*, *supra*, the contention that an unrecorded transfer from husband to wife was bad as to existing creditors, failed. There was in fact no fraudulent intent. It was not constructively fraudulent because made in satisfaction of pre-existing debts due the wife. It was not a voidable preference because more than six months had elapsed before the suit was brought. After correctly deciding these points, the court upheld the wife's right to retain the property without discussing the provisions of Sec. 2128. On this point the case is authority for no more than the proposition that the lack of record must be specially pleaded, and unless it is so pleaded the objecting creditor cannot take advantage of it.

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With these two cases which point toward the idea that "transfer" and "assignment" mean nothing more than "gift" in the statute under consideration, compare *Eberhardt v. Wahl's Admr*, 124 Ky., 223, 98 S. W., 994, 30 Ky.L. Rep., 412, and *Jones v. Louisville Tobacco Warehouse Co.*, 135 Ky., 824, 121 S. W., 633, 123 S. W. 307. In the former, a husband pledged stock to his wife as security against loss to her by reason of her property being pledged to secure his debt to a third person. It was said that the pledge was bad as against his creditors because unrecorded, although the decision protected her interests in another way. In the latter case, it was said that a pledge of personal property to secure the payment of rent due from the husband to the wife was invalid as against innocent creditors. Not only was this security for an existing debt, but there was the new consideration of the wife's refraining from bringing legal proceedings to enforce her statutory landlord's lien. There can be no doubt that in a case in which the point is involved and properly presented, the court will squarely hold that transfers of personal property from husband to wife are invalid against creditors unless recorded, notwithstanding the presence of consideration.

Granting that this is true, it remains to consider the effect of such invalidity and what transactions should be called transfers of personal property. Upon these questions, we get little help from the decisions.

Suppose that a husband has transferred a horse to his wife in exchange for a cow. Creditors who seek to subject the horse to the husband's debts manifestly ought not to be permitted to blow both hot and cold at the same time. If the transaction is set aside, the cow is still the wife's. If the husband has in the meantime sold the cow and the proceeds can be traced, he should hold those proceeds in constructive trust for the wife. If the proceeds cannot be traced, quære, should she not have a quasi contractual claim for the value of her cow, upon which claim she should receive a pro rata distribution along with other unsecured creditors?

Suppose that a husband has transferred to his wife a horse in exchange for her promise to pay him fifty dollars. If the transfer is

set aside at the suit of creditors the consideration for her promise has failed and it is unenforceable.

Suppose that a wife has transferred to her husband a cow in exchange for his promise to pay her fifty dollars. Creditors would probably prefer to let the wife prorate on her debt, rather than have the cow or its proceeds taken out of the husband's assets. If we are right in our postulate that the transaction must be set aside as a whole, if at all, no attack would be made when the cow is still in the husband's hands or the proceeds can be traced. If he has disposed of the cow and the proceeds cannot be traced, again, quære, ought she not to have a quasi contractual claim for the value of her cow if she is compelled to give up her contractual claim?

Suppose that the wife has permitted the husband to use her land in exchange for his promise to pay her a thousand dollars. Waiving the question whether a right to get money rent is realty or personality and treating it merely as a debt, an assignment of a rent note by a landlord to his wife would come within the statutory provision. But it is submitted that the creation of a debt from husband to wife which never existed before is neither a transfer nor an assignment of property. The words "transfer" and "assignment" connote the idea that something which formerly belonged to one person now belongs to another. But the right to collect rent never belonged to the debtor. It has never existed save as the property of the creditor. How then can it have been transferred or assigned from the debtor to the creditor? This somewhat finespun theory may be bolstered up by the result although not by any language in the opinion in *Jones v. Louisville Tobacco Warehouse Co.*, *supra*. There it was held that even as against pre-existing creditors, a wife may assert her statutory landlord's lien to secure rent which her husband had promised to pay in an unrecorded lease. Obviously, the lien is secondary and the obligation to pay is primary. The security provided by the statute would not be available unless the debt is an enforceable one independent of the lien statute.

Suppose that the husband has pledged a horse to the wife to secure a debt to her. The unrecorded pledge would be invalid as to third persons; but that in itself would not affect the validity of the



debt and the wife might share in a distribution of the husband's assets along with other unsecured creditors.

Suppose that the husband has transferred a horse to the wife in satisfaction of a pre-existing debt. Even if the period for attacking preferences as such has expired, creditors should be able to invalidate the unrecorded transfer, but that would leave the wife with an unsatisfied unsecured claim.

The results worked out above follow logically from the postulate that transactions between husband and wife should be set aside as a whole, if at all. Those results may prove shocking to lawyers anxious to protect the rights of creditors. But it should be borne in mind that we are now dealing with cases where consideration is present and there is no application for the maxim, "A man must be just before he is generous." It should also be borne in mind that where the spouses have actual intent to defraud creditors, the transaction can be set aside upon grounds which have nothing to do with the peculiar relation of husband and wife.

The idea underlying the statute here discussed is that since change of possession between spouses affords no notice to an outsider of a change in the situation of the parties while a change of possession between strangers does, therefore a record should be necessary to make valid a transaction between spouses where a change of possession is necessary and sufficient between strangers. The creation of unsecured debts between strangers involves neither a record nor a change of possession which other creditors can observe. While the results for the hypothetical cases stated above were reached without inquiring whether a creditor could observe the change in situation when similar transactions occur between strangers, it is interesting to notice that those conclusions do not conflict in any instance with that general idea underlying the statute.

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